IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

BEN EARL BROWDER,

Petitioner,

-vs-

DIRECTOR, DEPARTMENT OF CORRECTIONS,
STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CASES, STATUTES, AND OTHER AUTHORITY

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Petitioner Ben Earl Browder respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 28, 1976.

OPINIONS BELOW

None of the opinions in this case are reported. The opinion of the district court granting the petition for a writ of habeas corpus is reproduced infra at A3-A16; the order of the district court denying the respondent's motion to reconsider is reproduced infra at A26.

The order of the court of appeals reversing the decision of the district court is reproduced infra at A30-A36. (The order of the court of appeals is noted in the table of cases decided by unpublished opinion at 534 F.2d 330.) Rehearing was denied without opinion (A37).

Opinions in related state court proceedings are reported in abstract form only: People v. Browder, 13 Ill. App. 3d 198, 300 N.E.2d 511 (1973) (affirming conviction on direct appeal), reproduced infra at A39-A48; People v. Browder, 29 Ill.App.3d 596, 331 N.E.2d 162 (1975) (affirming denial of state post-conviction relief), reproduced infra at A49-A52.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1): The judgment of the court of appeals was entered on April 28, 1976; re-hearing was denied on June 18, 1976.

QUESTIONS PRESENTED

1. Did the court of appeals depart from the rule of United States v. Robinson, 361 U.S. 220 (1960), that the timely filing of a notice of appeal is "mandatory and jurisdictional," when it held that it "need not consider" the timeliness of a notice of appeal filed 128 days after entry of the final appealable order, apparently assuming that a motion to reconsider may be filed irrespective of the strict 10 day limits of Federal Rule of Civil Procedure 59?

2. Where the incompetency of appointed defense counsel has absolutely deprived petitioner, a state prisoner, of an opportunity to raise and have adjudicated his Fourth Amendment in the state courts either at trial, on direct appeal, or through state collateral proceedings, and federal relief to vindicate his unlawful arrest claim would not be precluded by Stone v. Powell, ___ U.S. ___ (1976):

a. May police officers, consistent with the Fourth Amendment, arrest all teen aged members of a family to deter-

b. Can there be "probable cause to arrest" absent grounds to believe that a particular suspect has committed an offense?

c. May police officers, consistent with the Fourth Amendment, enter a dwelling place without a warrant of any type in order to search for and "arrest for investigation" all teen aged males found in the home, when there is ample opportunity to have sought a warrant, where the facts known to the police are inadequate to allow an arrest on sight, and where the only possible justification for not seeking a warrant is the knowledge that one would not be issued?

3. Assuming that the Fourth Amendment does not prohibit warrantless, multiple suspect investigatory arrests, did the Court of Appeals err in resolving in the first instance disputed questions of fact, rather than remanding to the district judge who had presided at an evidentiary hearing?

4. May a United States Court of Appeals reverse a decision of a district court in an unpublished and non-citable opinion, when the case is not controlled by direct precedent, involves a substantial question pertaining to the protections of the Fourth Amendment, and where public notice of the decision might encourage Illinois to follow the lead of the American Law Institute and other states in enacting a statute to protect its citizenry from warrantless arrests for investigation?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, except upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

United States Constitution, Amendment XIV:

> . . . nor shall any state deprive any person of live, liberty, or property, without due process of law . . .

28 U.S.C. §2253, which provides in pertinent part:

> In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had. . .

Federal Rule of Civil Procedure 6(b), which provides in pertinent part:

> . . . [The court] may not extend the time for taking any action under Rule 50(b), 52(b), 59)b), (d), and (e), and 60(b), except to the extent and under the conditions stated in them.

Federal Rule of Civil Procedure 52(b), which provides in pertinent part:

> (b) Amendment. Upon motion of a party not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. . .

Federal Rule of Civil Procedure 59, which provides in pertinent part:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues . . . (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. . .
>
> (b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

* * *

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(d) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Federal Rule of Appellate Procedure 4(a), which provides in pertinent part:

(a) Appeals in Civil Cases. In a civil case . . . in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from. . .

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket. . .

Circuit Rule 35 (formerly Rule 28) of the United States Court of Appeals for the Seventh Circuit, the "Plan for Publication of Opinions of the Seventh Circuit," is set forth in the appendix, infra at A53-A57.

STATEMENT OF THE CASE

This case arises from the failure of Illinois -- either at trial,[1] on direct appeal,[2] or through state collateral proceedings[3] -- to have afforded petitioner

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1/ Counsel appointed by the state trial court to represent petitioner, an indigent person, demonstrated a lack of appreciation of the fact that the unlawfulness of an arrest may require exclusion of its products. As the district court noted (A9-A10), the illegality of petitioner's arrest is apparent from the trial court record. Although exclusion of the fruits of the unlawful arrest had been sought by trial counsel, the illegality of the arrest was not asserted as a ground for exclusion. (A5-A6) Thus, the district court held that "no reasonable tactical basis is apparent to justify the failure to object" to the illegality of the arrest. (A9) This finding was not challenged on appeal by the respondent.

2/ On direct appeal from his conviction, petitioner urged the unlawful arrest issue as "clear error." The Illinois Appellate Court refused to adjudicate the Fourth Amendment issue, relying on prior decisions that trial counsel's lack of appreciation of Fourth Amendment issues is an absolute bar to appellate review. (A43) Petitioner's contention that the intermediate appellate court had misapplied the state waiver rule was rejected without opinion by the Illinois Supreme Court, No. 46103, November 29, 1973. There, the question had been framed as follows:

> 2. Is the Illinois waiver rule properly applied when it denied a defendant a fair opportunity to raise and have adjudicated on direct appeal his Fourth Amendment claims, when the factual basis for these claims is clear from the trial court record? (Petition for Leave to Appeal at 3) (filed as an exhibit to the petition for a writ of habeas corpus in the district court)

3/ After his conviction had been affirmed by the Illinois Appellate Court, petitioner again sought to raise and have adjudicated the unlawful arrest issue in the state courts, through the state post-conviction remedy, Ill. Rev. Stat., ch. 38, §122-1 et seq. Relief was denied by the trial court, a result affirmed by the Illinois Appellate Court (A51):

> . . . Petitioner having argued in his direct appeal that his arrest was illegal and that all things flowing therefrom should have been suppressed is now barred from any further reconsideration of that issue in post-conviction proceedings by the doctrine of res judicata.

Ben Earl Browder a full and fair opportunity to raise and have adjudicated his Fourth Amendment claim that his identification at a lineup and his alleged oral admission were the tainted fruits of his brazenly unlawful arrest, an arrest made during a warrantless investigatory dwelling search undertaken to seize suspects for "investigation of rape."[4/]

When this issue was presented to the district court, Browder's application for a writ of habeas corpus was granted from facts apparent on the face of the state trial record. (A10) Rather than appeal this final order, the respondent filed, long after expiration of the 10 day period of Federal Rules of Civil Procedure 52 and 59, a motion to reconsider.[5/] (A17-A19) Although the jurisdictional basis for this motion was never disclosed, the district court rejected petitioner's objections as to its lack of jurisdiction to consider the motion, stayed execution of the writ, and set the matter for an evidentiary hearing on the motion to reconsider. (A20)

Testimony offered by the respondent at the evidentiary hearing was at times unlikely, in conflict with a contemporaneous arrest report, and contrary to testimony given by the arresting officers at petitioner's trial.[6/] What emerged as undisputed, however, is that at the time of the arrest, the police did not know which of the persons arrested would be identified in the lineup; the arrests were made to determine which suspect, if any, would be identified. (A23)

The district court denied the motion to reconsider,

4/ In the evening of January 31, 1971, four Chicago police officers entered the Browder residence to arrest all of the teen-aged males present. (Trial record at 163-165) The charge was "investigation of rape." (Trial record at 54, 154, 233)

Q: And you arrested them all on the charge of rape?
A: Investigation of rape.

Q: Investigation of rape?
A: Yes, sir. (Trial record at 54)

The purpose of the arrests was to "clear up an investigation," (Trial record at 67), by exhibiting the suspects in a lineup to see which one, if any, would be identified (A23):

Q: All right: Isn't it true, sir, that the purpose behind your arrest of the teen aged Browders was to bring them down to the station house to place them in a line-up?
(An arresting officer): To see if they could be identified by the victim. To see which one would be identified.

Q: At the time you arrested both Browders you didn't know which one, if either, would be the one who would be identified?
A: That is correct, sir.

The officers claimed to have had ample opportunity to have sought a warrant: "When I went to the Browder residence I knew the gentlemen would be waiting for me." (Trial record at 170) Nonetheless, the search and seizure was made without either an arrest or a search warrant. (Trial record at 192)

5/ The final order granting the petition was entered on October 21, 1975; the motion to reconsider was filed and

6/ The respondent sought to justify the arrest on the basis of information given to the arresting officers by the rape victim. The first investigating officer, Stan Thomas, testified that he had interviewed the rape victim on January 29, 1971, and was told by her that her assailant was known to her as having the last name of "Browder," and living in the 4000 block of West Monroe Street. (Transcript of evidentiary hearing at 16-19) Thomas, though, admitted that he failed to act on this information for two days (Ibid at 27), and no explanation was offered for this incredible lack of zealousness.

The principal arresting officer, Martin Conroy, testified that on January 31, 1971, he spoke with the rape victim, and was told by her essentially what she had told Thomas two days earlier. (Transcript of evidentiary hearing at 37) This contradicted the contemporaneous arrest report, adopted by Conroy as true (A23), which states that the arrests were based on information received from a "known informer." (A23)

The respondent also sought to prove that only petitioner and his brother had been arrested. (Transcript of evidentiary hearing at 43) Several police officers had uniformly testified at trial, however, that four persons were arrested in the Browder residence -- the two Browder brothers, and two other teenage males who happened to be present.

finding that "the writ of habeas corpus was properly issued on October 21, 1975." (A26) Notice of appeal was filed the next day (A27); specified as the orders under review were the order denying the motion to reconsider, and the order of October 21, 1975, granting the habeas corpus petition. (A27)

Browder was released from custody after a stay had been denied by a panel of the Seventh Circuit. (A28-A29) A different panel subsequently reversed the decision of the district court, holding that the multiple suspect investigatory arrest was lawful (A36), and stating that it need not "consider whether there was a timely notice of appeal." (A34 n. 2) Re-hearing was denied without opinion. (A37) 7/

In silent testament of the fact that no court or commentator has suggested that the Fourth Amendment allows a warrantless arrest of several suspects to determine which one should be charged, the Seventh Circuit has chosen to invoke its rule relating to the disposition of appeals in unpublished orders, and thereby to withhold its opinion in this case from public scrutiny: Petitioner's motion that the decision in this case be re-issued as a published opinion was denied without explanation on July 9, 1976. (A38)

7/ The district court subsequently quashed the writ, and petitioner surrendered to the custody of the respondent. (Petitioner's application for a stay, made while his petition for re-hearing was pending in the court of appeals, was denied by Mr. Justice Stevens on May 8, 1976, No. A980.)

ARGUMENT

I. IF THE COURT OF APPEALS MAY IGNORE THE "MANDATORY AND JURISDICTIONAL" REQUIREMENT THAT A NOTICE OF APPEAL BE TIMELY FILED, THEN IT MAY DISPENSE WITH ANY LIMITATIONS ON ITS JURISDICTION TO PRODUCE A DESIRED RESULT

In order to send petitioner Ben Browder back to prison, it was necessary for the Seventh Circuit to ignore the rule that the timely filing of a notice of appeal is "mandatory and jurisdictional." United States v. Robinson, 361 U.S. 220, 228 (1960). If this departure from the accepted and ordinary rules of appellate jurisdiction is allowed to stand, more will be lost than the liberty to which Browder is entitled: If the court of appeals may ignore the "mandatory and jurisdictional" requirement that a notice of appeal be timely filed, then the court of appeals may dispense with any limitations on its jurisdiction to produce a desired result. This, however, "is not the judicial process as we know it in our law." Cardozo, The Nature of the Judicial Process, 135 (1921). The departure of the Seventh Circuit from the accepted and ordinary rules of appellate jurisdiction therefore requires correction by this Court.

1. An appeal in a habeas corpus proceeding lies from from the final order, 28 U.S.C. §2253. 8/ The final order in this case was entered on October 21, 1975, when the district court granted petitioner's application for a writ of habeas corpus, and directed that the writ be executed if petitioner had not been re-tried within 60 days. 9/ The

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8/ Compare 28 U.S.C. §2253 (appeal lies from "final order) with 28 U.S.C. §1291 (appeal lies from "final decision"). Cf. United States v. Indrelunas, 411 U.S. 216 (1973).

9/ The conditional nature of the order of October 21, 1975 did not detract from its finality. E.g., Williams v. Overholser, 104 U.S.App.D.C. 18, 259 F.2d 175 (1958); Edwards

notice of appeal from this order was filed on January 27, 1976 (A27), hopelessly beyond the 30 day "mandatory and jurisdictional" limit of Federal Rule of Appellate Procedure 4(a). Thus, the court of appeals lacked the power to reverse the final order granting the petition: "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." Ex Parte McCardle, 74 U.S. (7 Wall) 506, 514 (1868).

2. The notice of appeal (A27) also specified as under review an order entered on January 26, 1976. That order (A26) denied a motion to reconsider, and directed that the writ be executed without further opportunity to the state to re-try petitioner. From a cryptic footnote[10/] it appears that the court of appeals assumed that its jurisdiction arose from this order. Such an assumption, however, is contrary to prior decisions of this court, as reflected in uniform decisions among the circuits.

a. The motion to reconsider (A17-A19) was not filed within the 10 day limits of Federal Rule of Civil Procedure 52 or 59, and therefore did not toll the time to appeal. See Federal Rule of Appellate Procedure 4(a); United States v. Robinson, 361 U.S. 220, 229 n. 13 (1960).[11/]

b. At best, the motion to reconsider was a motion under Federal Rule of Civil Procedure 60(b) -- a jurisdictional theory expressly disavowed by the respondent in the court below.[12/] Nor did the court of appeals treat the case as an appeal from the denial of a Rule 60(b) motion, where review is limited to determining if the district court abused its discretion in refusing to upset the finality of its earlier decision. E.g., Polites v. United States, 364 U.S. 426, 436 (1960).[13/]

c. The order of January 26, 1976 directing that the writ be executed did not provide a fresh opportunity to appeal from the earlier order which had granted the petition: "That order does no more than direct execution of the prior final judgment. Given the finality of the former, the latter order putting its alternative proviso into operation cannot be error." Edwards v. State of Louisiana, 496 F.2d 904, 906 (5th Cir. 1974); Grasso v. Norton, 520 F.2d 27, 38 (2d Cir. 1975). Just as the district court could not

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10/ A34 n. 2:

> Respondent contends that even if there was no probable cause for the arrest, the confession would be admissible under Brown v. Illinois, 422 U.S. 590 (1975). In light of our decision in the instant case the court need not consider that issue nor need it consider whether there was an untimely appeal as to this issue. (emphasis supplied)

Apparently, the court of appeals held that the notice of appeal was timely to bring up for review the legality of the arrest, the issue upon which reconsideration had been sought. (A18) Thus, it appears that the court of appeals concluded that the appeal from the denial of the motion to reconsider brought up for review the merits of the determination that the arrest was unlawful.

11/ See also Silk v. Sandoval, 435 F.2d 1266 (1st Cir. 1970); Stirling v. Chemical Bank, 511 F.2d 1030 (2d Cir. 1975); Rothman v. United States, 508 F.2d 648 (3d Cir. 1975); Burnside v. Eastern Airlines, 519 F.2d 1127 (5th Cir. 1975); Sadowski v. Bombardier, Ltd., 527 F.2d 1132 (7th Cir. 1975); Cline v. Hoogland, 518 F.2d 776 (8th Cir. 1975).

12/ In the court of appeals, respondent asserted that the motion to reconsider "was not filed under Rule 60," noting that "it is doubtful whether Rule 60 even applied in habeas cases." Reply Brief of Respondent-Appellant at 3 n. 1.

13/ See also Demers v. Brown, 343 F.2d 427 (1st Cir. 1965); Rothman v. United States, 508 F.2d 648 (3d Cir. 1975); Burnside v. Eastern Airlines, 509 F.2d 1127 (5th Cir. 1975); Brennan v. Midwestern United Life Insurance Co., 450 F.2d 778 (7th Cir. 1971); Cline v. Hoogland, 518 F.2d 776 (8th Cir. 1975); Hodgson v. United Mine Wrokers, 473 F.2d 113 (D.C. Cir. 1972).

maintain "continuing supervision over a retrial conducted pursuant to a conditional writ granted by the habeas court," Pitchess v. Davis, 421 U.S. 482, 490 (1975), the district court had no power to alter the finality of its order granting a conditional writ after expiration of the 10 day period for serving a Federal Rule of Civil Procedure 59 motion.

As set out above, there is no basis to support the jurisdiction of the court of appeals to reverse the final order entered 128 days prior to the filing of a notice of appeal. Certiorari should therefore be granted to correct this radical departure of the court of appeals from the accepted and ordinary rules of appellate jurisdiction.

II. WARRANTLESS ARRESTS FOR INVESTIGATION, A POLICE PRACTICE REPEATEDLY CONDEMNED BY THIS COURT, ARE LEGITIMIZED AND ENCOURAGED BY THE DECISION IN THIS CASE

In the evening of January 31, 1971, police officers searched petitioner's dwelling to arrest for "investigation of rape" (A10) all teen aged males who happened to be present; the admitted purpose of the multiple suspect arrests was "to see which one would be identified." (A23) The basis for this invasion upon the sanctity of the home and the dragnet arrests was "information" that one of the persons arrested had committed a rape two days before.[14/]

14/ The arrest report (A24), prepared at the time of the arrest, states that four suspects were arrested on the basis of "information from a known informer." Five years later, at the evidentiary hearing in the district court, the principal arresting officer stated that only two persons had been arrested, and that the arrests were based on information received from the rape victim. (A21)

The warrantless search and seizure was made without exigent circumstances,[15/] and was upheld by the Seventh Circuit.

The decision in this case resurrects the unbridled authority of the general warrant, and "place[s] the liberty of every man in the hands of every petty officer,"[16/] in conflict with prior decisions of this Court. If allowed to stand, the decision in this case encourages gross violations of Fourth Amendment rights, and requires review by this Court.[17/]

15/ The arresting officers claimed to have telephoned ahead, and knew "that the gentlemen would be waiting for me." (Trial transcript at 170)

16/ Stanford v. Texas, 379 U.S. 476, 481 (1965), quoting from Boyd v. United States, 116 U.S. 616, 625 (1886).

17/ Federal relief on the Fourth Amendment issue is not precluded by Stone v. Powell, ___ U.S. ___ (July 6, 1976). The record in this case demonstrates that because of the negligence or inadvertence of appointed defense counsel, petitioner was "denied an opportunity for a full and fair litigation of that claim at trial and on direct review." ___ U.S. at ___ n. 37.

Although appointed defense counsel sought to exclude from use at trial the fruits of the unlawful arrest, he never identified the unlawfulness of the arrest as a ground for suppression. Nor did appointed defense counsel seek to gain sympathy from the jury from the police misconduct -- final argument was waived. (Trial record at 278)

The absence of any tactical basis for the default of trial counsel was recognized by the district court. (A6-A8) This default deprived petitioner of an opportunity to raise the Fourth Amendment issue on direct appeal, or through the state collateral remedy. See ante at 6 n. 2, 3.

Under these circumstances, there has been a "failure of process . . . because the totality of the state procedures did not furnish the prisoner with a fair chance to litigate his case." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 455 (1963). Because this "failure of process" cannot be fairly attributed to petitioner, federal relief on the Fourth Amendment issue is not precluded by Stone v. Powell, supra.

A. THE IMPORTANCE OF THE ISSUE

This case involves one of the most important judgments made thousands of time daily in the nation's criminal justice systems: Whether there are reasonable grounds to make a warrantless arrest.

When Ben Browder, his brother, and two other "suspects" were arrested for "investigation of rape," the police did not know which suspect, if any, would be charged with the offense committed two days before. (A23) The district judge applied the ordinary meaning of probable cause to arrest, i.e., that there be reasonable grounds to believe that the arrestee had committed a crime, and held that Ben Browder had been unlawfully arrested. (A10) The Seventh Circuit did away with "offender probable cause,"[18] and held that several persons may be lawfully arrested whenever the police suspect that the offender sought will be caught up in such a dragnet.[19]

18/ "Offender probable cause refers to the probability that a particular individual has committed an offense. It is necessary for arrest but not, for instance, for issuance of a search warrant. See, e.g., People v. Daugherty, 324 Ill. 160, 154 N.E. 907 (1927); People v. Simmons, 330 Ill. 494, 161 N.E. 716 (1928)." Haddad, Criminal Procedure and Habeas Corpus, 52 Chi. K. L. Rev. 294, 299 n. 32 (1975).

19/ Contrary to the accepted and ordinary rules of appellate procedure, the court of appeals resolved in the first instance the disputed facts relating to the precise information known to the police at the time of arrest: What the court below described as "slight differences in the testimony of Officer Conroy at the evidentiary hearing from the arrest report and the trial," (A36) were rejected as inconsequential, and the court of appeals held that "the police had probable cause to believe that the assailant was either Ben Earl Browder or his brother Tyrone Browder, between whom a physical resemblance was noted." (Ibid) This "physical resemblance," though, overlooked the fact that at the time of his arrest, only petitioner had his arm in a cast, while the rape victim had failed to include this characteristic in her description of her assailant. The district court could well have resolved these "slight differences" in testimony in favor of petitioner, and concluded that the police did not have probable cause to believe that the assailant sought

If allowed to stand, the decision in this case leaves the Fourth Amendment as "little more than rhetoric."[20] By holding that arrests for investigation were based on "probable cause," and therefore lawful, the Seventh Circuit has simultaneously eliminated the deterrent of exclusion while rendering police officers immune for damages for investigative arrests under the "good faith" defense of Pierson v. Ray, 368 U.S. 547 (1967). This result signals the continuation of unbridled arrests for investigation, and presages "wholesale intrusions upon the personal security of our citizenry," Davis v. Mississippi, 394 U.S. 721, 726 (1969). The importance of this issue requires review by this Court.

B. CONFLICT WITH PRIOR DECISIONS OF THIS COURT

The investigatory arrests approved in this case were made to round up suspects to see if one of them would be identified in a line-up. While this Court has suggested

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19/ (cont)

These "slight differences in the testimony of Officer Conroy" were for resolution by the district court: "Appellate courts must constantly have in mind that their function is not to decide factual issues de novo." Zenith Radio Corp. v. Hazeltine Research Corp., 395 U.S. 100, 123 (1969). ". . .factfinding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court," DeMarco v. United States, 415 U.S. 449, 450 n. (1974). This is especially true in habeas corpus cases, where Congress has mandated that factual questions be resolved by a judge who has himself heard the testimony. Holiday v. Johnson, 313 U.S. 342 (1941); Wingo v. Wedding, 418 U.S. 461 (1974).

20/ Bivens v. Six Unidentified Agents, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting opinion)

that investigative detentions may be permissible in "narrowly circumscribed circumstances," Davis v. Mississippi, 394 U.S. 721, 728 (1969), the Court has repeatedly rejected invitations to approve warrantless arrests for investigation, as approved by the Seventh Circuit in this case.

The "practical compromise"[21/] that warrantless arrests are permissible requires that such arrests be based on reasonable grounds to believe that the arrestee had committed a crime.[22/] I.e., arrests must be based on probable cause, and may not be made to obtain probable cause.[23/]

In Wong Sun v. United States, 371 U.S. 471 (1963), a description of a suspect as "Blackie Toy," operator of a laundry "somewhere on Leavenworth Street," 371 U.S. at 481, was held insufficient to justify the arrest of a particular Toy: "Such information is no better than the wholesale or 'dragnet' search warrant." 371 U.S. at 481 n. 9. But under the reasoning of the Seventh Circuit in this case, the information available in Wong Sun would have justified an arrest of all laundry operators named Toy: In this case, the police at best knew that the offender sought was named Browder who lived in the 4000 block of West Monroe Street in Chicago; this information was held sufficient to justify the wholesale arrest of two teen aged male persons named Browder and two other teenagers, who happened to be be found by the police in the Browder residence in the 4000 block of West Monroe Street.

The wholesale arrests of the two Browders and the two other persons who happened merely to be present highlights the flaw in the expansive re-definition of "probable cause to arrest" adopted by the Seventh Circuit; certiorari should be granted to review the contraction of the Fourth Amendment apparent in this case.

C. A SUBSTANTIAL UNRESOLVED CONSTITUTIONAL QUESTION

The greatest vice of the investigatory arrests encouraged by the decision in this case is the unfettered discretion vested in the police to enter dwellings to make arrests "to clear up an investigation." If allowed to stand, this rule reads the warrant clause out of the Fourth Amendment, and "would obliterate one of the most fundamental distinctions between our form of government, where officers act under the law, and the police state, where they are the law." Johnson v. United States, 333 U.S. 10, 17 (1948).

The police had ample opportunity to seek a warrant prior to embarking on their expedition to the Browder residence. The offense under investigation had been reported on Janaury 29, 1971; two days had elapsed before the police began to act on the information purportedly obtained immediately after the offense.[24/] Warrants, however, were neither sought nor obtained.

21/ Gerstein v. Pugh, 420 U.S. 103, 113 (1975).

22/ E.g., Carroll v. United States, 267 U.S. 132, 161 (1925); Brinegar v. United States, 338 U.S. 160, 175-176 (1949); Beck v. Ohio, 379 U.S. 81, 91 (1964); Marion v. United States, 404 U.S. 307, 320 (1971); United States v. Watson, 423 U.S. 411, 431 n. 4 (Powell, J., concurring).

23/ See Mallory v. United States, 354 U.S. 449, 456 (1957); Johnson v. United States, 333 U.S. 10, 17 (1948); Henry v. United States, 361 U.S. 98 (1959); Gerstein v. Pugh, 420 U.S. 103, 120 n. 21 (1975). Cf. Brown v. Illinois, 422 U.S. 590 (1975).

24/ The arrest was made on January 31, 1971, apparently on the basis of information obtained by the police two days before, on January 29, 1971. (Transcript of evidentiary hearing at 17-19) No explanation was offered for the delay in acting on this information, if in fact it was received on January 29, 1971; apparently, the investigation stopped on January 29th and mysteriously re-commenced

1. If, instead of searching the Browder residence for a person thought to have committed an offense, the police were searching for physical evidence of that offense, it is clear that a warrant would have been required. E.g., McDonald v. United States, 335 U.S. 451 (1948).

2. Prior to embarking on their expedition to the Browder residence, the police knew "that the gentlemen would be waiting for me." (Trial record at 170) Thus, "there was no probability of a material change in the situation during the time necessary to secure [a] warrant." Taylor v. United States, 286 U.S. 1, 6 (1932). Nor can the absence of a warrant be justified by any need to prevent the destruction of evidence. See United States v. Jeffers, 342 U.S. 48 (1951); Chapman v. United States, 365 U.S. 610 (1961); Coolidge v. New Hampshire, 403 U.S. 443, 460-464 (1971).

3. The physical description available to the police was too vague to allow an arrest "on sight," as in United States v. Watson, 423 U.S. 411 (1976). The offenders sought had been described only as "two black males, one light complected and one dark complected, both wearing brown jackets and in their late teens." (Transcript of evidentiary hearing at 9) No height or weight description had been obtained. (Ibid at 12) Thus, the police could not maintain surveillance of the Browder residence, and arrest a suspect when he emerged -- essential to their mission was the entry into the dwelling place, and the search for "suspects." Compare United States v. Santana, ___ U.S. ___, ___ (1976) (Stevens, J., concurring).

4. The only warrant that the police could have obtained would have been a general warrant, authorizing the arrest of all teen aged males either named Browder or found to be in the Browder residence in the 4000 block of West Monroe Street. An application for such a general warrant would have been refused. Wong Sun v. United States, 371 U.S. 471, 481 n. 9 (1967); Whiteley v. Warden, 401 U.S. 560 (1971).

If, as the court of appeals held, petitioner was lawfully seized from his dwelling, the warrant clause of the Fourth Amendment is "dead language," United States v. United States District Court, 407 U.S. 297, 315 (1972). Certiorari should be granted to resolve this question, a question repeatedly reserved by the Court, e.g., United States v. Watson, 423 U.S. 411 (1976).

D. CONFLICT WITH DECISIONS IN OTHER JURISDICTIONS

This Court has left open the question of under what circumstances, if any, investigative detentions are permissible under the Fourth Amendment. United States v. Dionisio, 410 U.S. 1, 11 (1973). In conflict with the Court of Appeals for the District of Columbia,[25/] the Seventh Circuit has answered this question by holding that investigative detentions are permissible whenever the police wish to clear up an investigation.

A vastly different balance has been struck in other jurisdictions,[26/] as reflected in Article 170 of the American

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25/ Adams v. United States, 130 U.S.App.D.C. 203, 399 F.2d 574 (1968); United States v. Allen, 133 U.S.App.D.C. 84, 408 F.2d 1287 (1969); United States v. Greene, 139 U.S.App.D.C. 193, 429 F.2d 193 (1970)

26/ E.g. Wise v. Murphy, 275 A.2d 205 (D.C.App. 1971) (en banc); In re Fingerprinting of M.B., 125 N.J. Super 115, 309 A.2d 3 (1973); State v. Bribalva, 111 Ariz. 476, 533 P.2d 533 (1975). See also Ariz. Rev. Stat. Ann. §13-1424; Idaho Code §19-625 (1975 supp); N.C. Gen. Stat. §15A-271 et seq.

Law Institute, A Model Code of Pre-Arraignment Procedure (1975).

Article 170 of the Model Code sets out a procedure for an "order to appear for identification procedures." The salient feature of the model statute is the requirement for prior authorization by a judicial officer, based upon a detailed showing of articulated facts.[28/] This "independent, neutral, and detached judgment," North v. Russell, ___ U.S. ___, ___ (1976) is lacking in the procedure sanctioned by the Seventh Circuit.

"The Fourth Amendment imposes limits on search and seizure powers in order to prevent oppressive interferences by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuerte, ___ U.S. ___, ___ (1976). The decision in this case removes those limits by creating a "hunting license" for investigative arrests. Little reminder is needed that an arrest "is abrupt, is effected with force or the threat of it, and often in demeaning circumstances," United States v. Dionisio, 410 U.S. 1, 10 (1973), quoting from United States v. Doe (Schwartz), 457 F.2d 895, 898 (2d Cir. 1972). Certiorari should be granted, lest the Fourth Amendment be mere precatory language.

28/ Section 170.2(6) of the Model Code requires than an application for an order for nontestimonial identification be supported by one or more affidavits showing

(a) there is reasonable cause to believe that an offense specifically described in the application has been committed;

(b) there are reasonable grounds to suspect that the person named or described in the affidavit may have committed the offense and it is reasonable in view of the seriousness of the offense to subject him to the specific identification procedures set forth in the application;

III. CERTIORARI SHOULD BE GRANTED TO REVIEW THE BURGEONING TREND TOWARDS "SECRET LAW" IN THE UNITED STATES COURTS OF APPEALS

The decision in this case made new law in the Seventh Circuit, and is contrary to the weight of authority in other jurisdictions. See ALI, A Model Code of Pre-Arraignment Procedure (1975), 460-462. Nonetheless, the decision in this case is an "unpublished order," and may not be cited to the Seventh Circuit or to any district court in that circuit as precedent. E.g., Shear v. Richardson, 364 F.Supp. 43, 44 n.1 (S.D. Ill. 1973); United States v. Feinberg, 371 F.Supp. 1205, 1214 n. 9 (N.D. Ill. 1974). Hicks v. Miranda, 422 U.S. 332 (1975) teaches that police officers may rely on the disposition of this case, and continue to conduct warrantless, multiple suspect investigatory arrests. Such reliance would constitute "good faith," and afford the officers impunity from any action for damages. Pierson v. Ray, 368 U.S. 547, (1967). This anomalous result, which insulates from public scrutiny the novel view of the Fourth Amendment extant in the Seventh Circuit, but allows police officers to rely on this broad licence to undertake investative arrests, is the result of the Seventh Circuit's "plan for publication of opinions," set out in current Circuit Rule 35, reproduced at A53-A57.

The "plan for publication" of the Seventh Circuit, like its counterpart in the other circuits, arose from a recommendation of the Judicial Conference. See Hastings The Seventh Circuit Plan for Publication of Opinions -- A Continuing Experiment, 51 Ind. L.J. 366 (1976). Common to all of these plans is a procedure for adjudicating an appeal through an "unpublished order," which is supplied to the

parties and available to this Court in evaluating requests for further review. E.g., Rose v. Hodges, 423 U.S. 19 (1975), where this Court recognized and resolved an intra-circuit conflict through reference to "unpublished opinions." 423 U.S. at 24 n. 2 (Brennan, J., dissenting).

In all circuits other than the Tenth Circuit[29/] "unpublished opinions" may not be cited as precedent. In the Fifth and Eighth Circuits,[30/] only affirming orders may be disposed of in an "unpublished opinion." In the First, Seventh, Ninth, and Tenth Circuits,[31/] publication is required whenever the decision appealed from is reported; but if the decision appealed from is unreported, then the court of appeals, as in this case, is free to reverse in an "unpublished opinion." In the remaining circuits where an "unpublished opinion" rule has been promulgated,[32/] the court of appeals may reverse even a reported district court decision in an "unpublished opinion."[33/]

A recent addition to the "unpublished opinion" rule of the Seventh Circuit is a provision allowing "any person" to request that a decision by unpublished order be re-issued as a published opinion; petitioner made such a motion in this case, and the motion was denied without explanation. (A38)

29/ Rule 17(c) of the Tenth Circuit allows citation of unpublished opinions, and requires counsel to supply opposing counsel with a copy of the unpublished opinion.

30/ Fifth Circuit Rule 21; Eighth Circuit Rule 14.

31/ First Circuit, Appendix B to Circuit Rules; Seventh Circuit, Rule 35(c); Ninth Circuit Rule 21(f); Tenth Circuit, Rule 17(g).

32/ Neither the Third nor the Fourth Circuits have apparently promulgated a formal rule dealing with disposition of appeals in unpublished orders. In the Fourth Circuit, however, pro

This case therefore provides the Court with a needed opportunity to review the propriety of these "unpublished opinion" rules, to review the conflict between the rules of the several circuits as to whether it is permissible to reverse in an unpublished opinion, and to halt the burgeoning trend towards "secret law."

1. The effect of not publishing the opinion in this case is to withhold from public scrutiny the view of the Seventh Circuit that warrantless arrests for investigation are not prohibited by the Fourth Amendment. This result had not been reached by the Seventh Circuit in any prior case, and, as reflected in the opinion, there is no direct precedent supporting the power of the police to arrest, without warrants, several suspects to determine whom they should charge. See A34-A36. The weight of authority, in fact, is to the contrary. See ALI, A Model Code of Pre-arraignment Procedure (1975), 460-462. Exposing the minority view of the Seventh Circuit to public scrutiny may well result in the states within that circuit adopting statutes to protect their citizenry from unregulated investigative arrests; even if such arrests are not prohibited by the Fourth Amendment, the states may of course establish a higher standard, e.g., Lego v. Twomey, 404 U.S. 477, 480 (1972), but the need for a higher standard is unknown if the decision in this case is withheld from publication.

2. The problems inherent in disposition of an appeal by "unpublished order" is not limited to this case, nor to the Seventh Circuit. See, e.g., Report of the Chicago Bar Association Committee on Appellate Court Congestion and Procedure, 56 Chi. Bar. Rec. 16, 20-21 (1974); Haddad, Criminal

n. 29 (1975); Weisgall, Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion, 9 Univ. San. Fran. L. Rev. 219, 253-254 (1974); Gardner, Ninth Circuit's Unpublished Opinions: Denial of Equal Justice? 61 A.B.A.J. 1224 (1975).

3. In contrast to the summary disposition rules of the Fifth and Eighth Circuits, the rule of the Seventh Circuit allows, as in this case, a reversal absent published opinion. Mr. Justice Brennan recently observed that affirming without opinion is a procedure fraught with difficulties, Colorado Springs Amusements, Ltd v. Rizzo, ___ U.S. ___ (July 6, 1976) (Brennan, J., dissenting from denial of certiorari). These difficulties are even more pronounced when, as here, a decision is reversed without published opinion.

4. As applied in this and other cases, the effect of the "unpublished opinion" rule is to allow a court of appeals discretion to decide which appeals it will decide on their merits. Assuming that a court has jurisdiction over a case, any adjudication is an adjudication on the merits, and entitled to precedential effect. See Hicks v. Miranda, 422 U.S. 332, 344 n. 14 (1975). This is recognized by the Tenth Circuit, in its rule 17(c) which allows citation of unpublished opinions. But absent such a provisions, the "unpublished opinion" rules allow a court of appeals to decide which of its decisions will have precedential effect, and thereby vests a court of appeals with the power to determine which appeals it will decide, a power lacking in our system, Garrisson v. Patterson, 391 U.S. 464 (1968).

5. A potential evil of the "unpublished opinion" rules is that they allow the courts of appeals "to avoid making a difficult or troublesome decision or to conceal

Workers, 430 F.2d 966, 972 (5th Cir. 1970) (Brown, C.J.) This may well be the justification for withholding the opinion in this case from publication.

For these reasons, certiorari should be granted to review the propriety of "unpublished opinion" rules, to review the conflict between the rules of the several circuits as to whether it is permissible to reverse in an unpublished opinion, and to halt the burgeoning trend towards "secret law."

CONCLUSION

For the reasons above stated, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding.

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